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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 MASS, 3/F

425 I Street, NW

Washington, D.C. 20536

JAN 27 2004

File: [REDACTED] Office: ST. PAUL Date:

IN RE: Applicant: [REDACTED]  
Beneficiary: [REDACTED]

Application: Application for Advance Processing of Orphan Petition pursuant to 8 C.F.R. § 204.3(c)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED


## INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

*for*   
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The District Director of the St. Paul, Minnesota District Office denied the application for advance processing of an orphan petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant filed the Application for Advance Processing of Orphan Petition (Form I-600A) on July 8, 2003. The applicant is a 30-year-old married citizen of the United States, who together with her spouse, seeks to adopt two children from Guatemala under three years of age.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F), defines orphan in pertinent part as:

(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption . . . who is coming to the United States for adoption by a United States citizen and spouse jointly . . . Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States.

The district director denied the application because of the arrest history of the applicant's spouse. The district director noted the type of arrests, the recency of the spouse's last arrest on December 31, 2002 for driving while intoxicated (DWI), that the spouse was still on probation, and that there had not been an adequate amount of time that had passed to determine if rehabilitation had occurred.

The record of proceeding contains the Form I-600A application and accompanying documentation, the applicant's spouse's conviction record, a home study, the director's denial notice, and the appeal documents.

The applicant initially provided CIS with a home study report dated June 25, 2003 indicating that the applicant's spouse was arrested in 1985 for criminal damage. The spouse indicated that he did not have a history of substance abuse, but admitted he was arrested in 1992 and 2002 for DWI. The home study stated that the spouse had undergone an assessment, and was currently participating in classes to help him better understand the dynamics of chemical abuse and operating a vehicle. The report indicated that the spouse did not have an ongoing problem, but had demonstrated a lack of good judgment.

On August 6, 2003, the district director requested certified copies of the arrest and disposition records for the criminal damage and DWI incidents, documents indicating that the applicant's spouse had complied with all the conditions of the sentencing, and a signed statement regarding the details, including mitigating circumstances about each incident.

In response, the applicant submitted certified arrest records and court documents establishing the following offenses:

1. On March 20, 1985, the applicant's spouse was convicted in the circuit court of Vernon County, WI, of criminal damage to property, a misdemeanor. (Case [REDACTED]) He was placed on probation for a period of six months.
2. On December 31, 2002, the applicant's spouse was cited for operating under the influence (2<sup>nd</sup>) after an automobile accident. On March 3, 2003, he was convicted in the Circuit Court of Vernon County, WI, of operating while intoxicated (1<sup>st</sup>), a misdemeanor (Case [REDACTED]). His driver's license was revoked for a period of seven months, and he was ordered to attend a schedule of Multiple Offender Program classes from June 14 - October 14, 2003.

The applicant also submitted a court document showing that on April 9, 1992, the applicant's spouse was convicted in LaCrosse, WI, of an unspecified offense (no case number listed). It appears that his license was revoked for a period of seven months. The applicant did not submit an arrest record establishing the charges nor does the court document have specific information establishing that this is the requested final disposition for the 1992 DWI referenced in the home study. The applicant has failed to submit the requested information. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

On appeal, the applicant submits a three-page letter from herself and a one-page letter from her spouse. The applicant asserts that her husband has changed and has taken responsibility for his actions, and requests the chance to raise good children. The applicant's spouse states in his letter that he has taken responsibility for his actions, that he is taking steps to ensure that it will never happen again, and that he will be a loving and devoted father. The applicant also submits a letter indicating that her spouse's driver's license was reinstated on October 1, 2003, and that he completed the Multiple Offender Program of classes on October 18, 2003.

The regulation at 8 C.F.R. § 103.2(b)(12) provides that an application shall be denied when the evidence does not establish filing eligibility at the time the application was filed. At the

time of filing the Form I-600A, the applicant's spouse had not demonstrated rehabilitation from substance abuse, as he was still in the process of state ordered rehabilitation and his license was under revocation. Successful rehabilitation is not over until a program has concluded. The evidence establishes that the spouse successfully completed the program of classes on October 18, 2003. Thus, the applicant could not have established successful rehabilitation at the time of filing in July, 2003.

The regulation at 8 C.F.R. § 204.3(e)(2)(B) states, in pertinent part:

If . . . the home study preparer becomes aware of [history of substance abuse] . . . the home study report must contain an evaluation of the suitability of the home for adoptive placement of an orphan in light of this history. This evaluation must include information concerning all arrests or convictions or history of substance abuse, sexual or child abuse, and/or domestic violence and the date of each occurrence.

The regulation at 8 C.F.R. § 204.3(e)(2)(C) provides that:

*Evidence of rehabilitation.* If a prospective adoptive parent has a history of substance abuse, sexual or child abuse, and/or domestic violence, the home study preparer may, nevertheless, make a favorable finding if the prospective adoptive parent has demonstrated appropriate rehabilitation. In such a case, a discussion of such rehabilitation which demonstrates that the prospective adoptive parent is and will be able to provide proper care for the orphan must be included in the home study. Evidence of rehabilitation may include an evaluation of the seriousness of the arrest(s), conviction(s), or history of abuse, the number of such incidents, the length of time since the last incident, and any type of counseling or rehabilitation programs which have been successfully completed. Evidence of rehabilitation may also be provided by an appropriate licensed professional, such as a psychiatrist, clinical psychologist, or clinical social worker. The home study report must include all facts and circumstances which the home study preparer has considered, as well as the preparer's reasons for a favorable decision regarding the prospective adoptive parent.

The home study report does not adequately evaluate the suitability of the prospective adoptive home in light of the petitioner's substance abuse and criminal history. With respect to the DWI and criminal convictions, the report bases its recommendation that the parents be approved for adoption on the

fact that the applicant's spouse underwent a state ordered assessment, which indicated there was not an ongoing problem, and was at the time of the home study enrolled in a multiple offender program of classes following his second DWI conviction. The home study fails to cite evidence of successful rehabilitation from a licensed professional or any type of counseling or rehabilitation program that has been successfully completed. The study fails to discuss the previous DWI conviction or adequately address through medical or other evidence that the applicant does not have an ongoing substance abuse problem in light of the earlier DWI conviction. The study fails to address the suitability of the prospective parents for adoption in light of the criminal conviction.

While the AAO finds the home study delinquent in that it fails to adequately demonstrate the preparer's reasons for a favorable decision in light of the substance abuse and criminal history of the applicant's spouse, the AAO will affirm the decision of the district director, in that the applicant failed to demonstrate successful rehabilitation at the time of filing.

CIS may not approve a Form I-600A unless it is satisfied that the applicant and her spouse will provide proper parental care to an adopted orphan. Section 101(b)(1)(F)(i) of the Act, 8 U.S.C. § 1101(b)(1)(F)(i). The statute requires the submission of a favorable home study. Section 204(d)(1) of the Act, 8 U.S.C. § 1154(d)(1). CIS is not, however, bound by the home study preparer's favorable recommendation, but must, instead, assess all the evidence and reach an independent judgment concerning whether the applicant and his spouse will provide proper parental care to an adopted orphan. 8 C.F.R. § 204.3(h)(2). As her spouse was not successfully rehabilitated following his DWI conviction at the time of filing, the district director correctly concluded that the applicant had not established that she and her spouse would provide suitable parental care to an adopted orphan.

The applicant has not presented sufficient evidence to overcome the director's decision to deny the application.

Beyond the director's decision, it should be noted that the applicant's spouse appears to have an additional criminal arrest that has not been addressed. The home study report cites to a medical examination report on the applicant's spouse. According to the medical examination report, the applicant's spouse admitted to an arrest for Driving While Under the Influence when he was twenty-two years old. The applicant's spouse was born in 1966 so the arrest would have been in 1988 or 1989. There is no further information on this arrest or its disposition within the record.

In visa petition proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.



**ORDER:** The appeal is dismissed.